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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 71-1442.

ROLAND V. COLGROVE,

Petitioner,

against

HONORABLE JAMES F. BATTIN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION,

Respondent.

Civil No. 783.

ROLAND V. COLGROVE,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

BRIEF OF INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL AS AMICUS CURIAE.

SUMMARY OF ARGUMENT.

The instant six-member jury rule and all similar local jury rules of the federal District Courts are beyond the limited rule-making power of the District Courts for the following reasons. (1) They represent "basic procedural in-

novations" which are forbidden to District Courts under the doctrine of *Miner* v. *Atlass*, 363 U. S. 641 (1960). (2) They substantially decrease the chances of representation of minority viewpoints on the jury and substantially increase the risk of what might be termed "far-out" verdicts. (3) They frustrate the policy of the jury selection statutes to maximize the chances of obtaining juries representative of a "fair cross section" of the community and the policy of the peremptory challenge statute that not more than one-half of a jury may be unseated by peremptory challenges. (4) They conflict with the express grant of authority to the parties under Rule 48, F. R. Civ. Pro., to stipulate to a jury larger or smaller than six members. (5) They conflict with the intent, implicit in Rule 48, that a stipulation of the parties should be the *sole* means of reducing the jury to less than twelve members. (6) These local jury rules, in their diversity, create a "procedural Tower of Babel"* in a "field of federal jurisdiction where nationwide uniformity has traditionally always been highly esteemed".**

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* See footnote 21, *infra*.

** *Miner* v. *Atlass*, 363 U. S. 641, 649 (1960).

ARGUMENT.

I.

THE CIVIL JURY SYSTEM SHOULD BE PRESERVED IN ALL BASIC ESSENTIALS AND ANY SIGNIFICANT CHANGES IN IT SHOULD BE MADE ONLY BY LEGISLATION OR AMENDMENT OF THE FEDERAL RULES OF CIVIL PROCEDURE.

International Association of Insurance Counsel[1] wishes to express its appreciation to the Court and to the parties for the opportunity to submit a brief *amicus curiae* in this proceeding.

It is planned to leave to able counsel for the parties discussion of the important constitutional and statutory points in this case, while limiting this brief to a single issue of prime concern to the I. A. I. C. membership: the scope of the rule-making power of United States District Courts, as applied to the instant six member jury rule.

To say that two thousand trial lawyers, as diversified in background and experience as the members of this Association, do not speak with a single voice, is to put it mildly. We venture to predict, nevertheless, that an overwhelming majority of our members would agree upon three propositions:

1. International Association of Insurance Counsel (I. A. I. C.) is composed of more than two thousand insurance defense counsel (both house counsel and independent trial counsel) in all parts of the United States and Canada. Membership includes lawyers from large communities and small, large firms and small, trial specialists and general practitioners, lawyers whose practice is virtually confined to defense work, and lawyers who occasionally find themselves sitting at the plaintiff's bar.

(1) Constitutional requirements aside, our jury system in all important essentials should be preserved for *civil*, as well as criminal, trials.[2]

(2) To the extent possible, without encroachment upon its essence,[3] our jury system should be sufficiently flexible to permit its adaptation to the needs of changing times.

(3) Basic trial and appellate procedures should apply uniformly throughout the federal court system, and fundamental procedural changes, such as rules which cut in half the traditional twelve-member common law jury, should not be adopted without the kind of widespread and thorough consideration which attends the amendment of the Federal Rules of Civil Procedure.[4]

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2. The supporters of the jury system tend to share these perceptions: (i) They are skeptical of the ability of any one man or judge, however gifted, to form his judgments in the cool light of reason, unswayed by predeliction, passion or prejudice. (ii) They do not share Herbert Spencer's contempt for the "twelve people of average ignorance" (Kalven & Zeisel, *The American Jury* [Little Brown and Company, 1966] p. 6). (iii) They recognize that the intelligence and sensibility required of jurors is not the product of book-found knowledge, but the wisdom born of human experience and the compassion born of human suffering. (iv) They have not infrequently perceived in the collective verdict of juries a keen eye for truth, a sensitive nose for fraud or sham, a voice of moderation and an instinctive sense of right and wrong, which is the measuring stick of justice. Are not these the perceptions on which we have staked our very system of government?

3. If it be conceded, as declared in *Williams* v. *Florida*, 399 U. S. 78 (1970), that fixing the number of jurors at twelve was an historical accident, "wholly without significance 'except to mystics'" (399 U. S. p. 102), it remains true, nevertheless, that the *size* of a jury may be of the essence. It must be large enough to "provide a fair possibility for obtaining a representative cross-section of the community" (399 U. S. p. 100). It must be small enough to "remain manageable", Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710, 712 (Summer '71). Cp. 28 U. S. C. § 1861, Jury must be selected from "a fair cross-section of the community."

4. See 28 U. S. C. § 331, enjoining the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," and 28 U. S. C. § 2072, empowering the Supreme Court to "prescribe, by general rules

II.

THE INSTANT SIX MEMBER JURY RULE IS A "BASIC PROCEDURAL INNOVATION," BEYOND THE RULE-MAKING POWER OF A FEDERAL DISTRICT COURT UNDER THE DOCTRINE OF MINER v. ATLASS.

A. Major Procedural Changes Should Be Reviewed by the Judicial Conference and Reported to Congress, as in the Case of Amendments to the Federal Rules.

In *Miner* v. *Atlass*, 363 U. S. 641, 80 S. Ct. 1300, 4 L. Ed. 2d 1462 (1960), "basic procedural innovations" (363 U. S. p. 650) were held to be beyond the scope of the rule-making power of a federal district court.

Unlike the case at bar, *Miner* arose out of an admiralty suit and dealt with a local District Court rule, authorizing oral discovery depositions in admiralty.[5] Both *Miner* and the case at bar, however, were mandamus suits. Both suits were brought to test the validity of local procedural rules of United States District Courts. In both cases the procedural rules in question represented sweeping departures from long-standing tradition. And in both cases the rules of general application (General Admiralty Rules and Federal Rules of Civil Procedure, respectively) in similar terms extended to District Courts a broad grant of power

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• • • the practice and procedure of the district courts of the United States in civil actions," subject to certain limitations, including a duty to report such rules to Congress and to "preserve the right of trial by jury as at common law." See also Report of Proceedings of Jud. Conf. of U. S. 3/15-16/71, pp. 5-6, adopting Resolution in favor of smaller juries, but referring back to committees the question, whether the means should be by "rule-making or statute". Two six member jury bills were introduced in the 92*d* Congress, H. R. 7800 by W. L. Scott of Virginia and H. R. 13,496 by E. Celler of New York. Neither was enacted, though the Justice Department endorsed the Celler bill.

5. *Miner* v. *Atlass*, *supra*, was decided some six years prior to the repeal of the separate admiralty rules (80 Stat. 323) and the general unification of the civil and admiralty rules of procedure, effective July 1, 1966.

to "regulate their practice" in any manner "not inconsistent with these [the general] rules."[7]

In a majority opinion, written by the late Mr. Justice Harlan,[8] the Court inferred from the carefully devised scheme for widespread review before adoption, of rules of practice and procedure prescribed by the Supreme Court, a general intention that all *basic procedures* should be covered by the Supreme Court rules so formulated, leaving the "interstices" to "be the subject of appropriate local regulation" (363 U. S. p. 648.) Accordingly, by way of judicial gloss, the Court read into the grant of District Court rule-making power an implicit prohibition[9] against the adoption of local rules, constituting "basic procedural innovations":

> "[T]he matter is one which, though concededly 'procedural,' may be of as *great importance to litigants* as many a 'substantive' doctrine, and which arises in a field of federal jurisdiction where *nationwide uniformity has traditionally always been highly esteemed.*
>
> "The problem then is one which peculiarly calls for exacting observance of the statutory procedures sur-

7. Cp. General Admiralty Rule 44 with Rule 83 F. R. Civ. Pro. See also 28 U. S. C. § 2071, which confers upon "all courts established by Act of Congress" power to "prescribe rules for the conduct of their business," consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

8. The majority was composed of six justices: Chief Justice Warren, and Associate Justices Black, Frankfurter, Clark, Harlan and Whittaker.

9. The Court found no *express* inconsistency between the local discovery deposition rule and the General Admiralty Rules. It did infer from the failure to incorporate into the General Admiralty Rules, Rule 26 F. R. Civ. Pro., authorizing discovery depositions in civil cases, a deliberate intention not to "*impose* the [discovery deposition] practice on the District Courts." But it recognized that the non-incorporation of Rule 26 F. R. Civ. Pro. "does not necessarily bespeak an intention to foreclose each District Court from exercising a 'local option' under Rule 44 "to adopt discovery deposition rules." (See *Miner* v. *Atlass, supra,* 363 U. S. p. 648.)

rounding the rule-making powers of the Court, see 28 U. S. C. § 331, 28 U. S. C. A. § 331 (advisory function of Judicial Conference[10].), 28 U. S. C. § 2073, 28 U. S. C. A. § 2073 (prior report of proposed rule to Congress), designed *to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters* with all the opportunities for comprehensive and integrated treatment which such consideration affords." *Miner* v. *Atlass*, 363 U. S. pp. 649-650. (Emphasis supplied.)

The dissentors[11] in *Miner*, pointing out that "over half the admiralty litigation in the federal courts is conducted in courts having discovery-deposition rules like the one today nullified," could not agree to "a judgment which lightly brings about so widespread a turning back of the clock in the admiralty practice through the Nation." (363 U. S. p. 652-653.) In their view, "the Court's opinion fails completely to demonstrate a lack of power to promulgate the rule in question" (363 U. S. 654) and "there is nothing in General Rule 44 confining the local rulemaking power to exercises in the trivial." (363 U. S. 655.) The dissentors summarized their threefold objections to the majority decision, as follows (363 U. S. p. 665):

> "The Court's action nullifies these many local admiralty discovery-deposition rules, and casts an uncertain cloud over other local admiralty and civil rules. It creates an unfortunate hiatus in the development of discovery in admiralty by postponing the further collection of practical experience in the matter until a General Rule can be produced."[12]

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10. See Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A. B. A. J. 772 (Aug. 1961).

11. The dissenting opinion was written by Mr. Justice Brennan, joined by Messrs. Justices Douglas and Stewart.

12. Since this Court handed down its decision in *Miner* v. *Atlass*, *supra*, 363 U. S. 641 (1960), the case has been cited by this Court only three times. See *Goldlawr, Inc.* v. *Heiman*, 369

The principle, announced in *Miner* v. *Atlass, supra,* 363 U. S. 641, 650 (1960), that "basic procedural innovations" are beyond the admiralty rule-making power of a federal District Court, obviously applies with equal force to a District Court's civil suit rule-making power. This is particularly true, in view of the close similarity between the grant of admiralty rule-making authority under General Admiralty Rule 44 and the grant of civil suit rule-making authority under Rule 83 of the Federal Rules of Civil Procedure.[13] Recognizing that the implications of the doctrine of *Miner* v. *Atlass* extend into the realm of local civil rule-making, the 1971 Pocket Part of Barron and Holtzoff's treatise on Federal Practice and Procedure includes this warning:

> "In the light of this decision [*Miner* v. *Atlass,* 363 U. S. 641 (1960)], it is possible that some of the more far-reaching local rules recently adopted, discussed in section 1713, may not be valid," 3A Barron and Holtzoff, Federal Practice and Procedure [Rules Ed. 1958], 1971 Pocket Part, § 1711 p. 68.

Thus in *Farmer* v. *Arabian American Oil Company,* 285 F. 2d 720, 722 [2d Cir. 1960], the court criticized and (as

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U. S. 463, 468, 82 S. Ct. 913, 917, 8 L. Ed. 2d 39, 43 (1962) holding that a federal court, lacking both personal jurisdiction and venue, may transfer case to another federal court having both; *Fitzgerald, Public Administrator* v. *United States Lines Co.,* 374 U. S. 16, 22, 83 S. Ct. 1646, 1651, 10 L. Ed. 2d 725 (1963) holding that Jones Act claim and admiralty claim for maintenance and cure must be tried to jury together; *Harris* v. *Nelson,* 394 U. S. 286, 307, 89 S. Ct. 1082, 1094, 22 L. Ed. 2d 281, 295 (1969) holding interrogatories a permissible procedure in habeas corpus proceeding. Each of these citations to *Miner* was in a dissenting opinion by Mr. Justice Harlan, in which he suggested that the Supreme Court, itself, should refrain from adopting what he regarded as innovative procedures, without first submitting them to the Judicial Conference and to Congress, as required in the case of adoption of new Federal Rules of Procedure.

13. The striking similarity between General Admiralty Rule 44 and Rule 83, F. R. Civ. Pro. was noted by Mr. Justice Brennan in the dissenting opinion in *Miner* v. *Atlass,* 363 U. S. 641, 655.

applied in that case to exact a $6,000 bond) held invalid, a local District Court rule, requiring non-residents to post a cost bond of $250, subject to increase or decrease in the court's discretion.

Again, in *First National City Bank of New York* v. *Aristeguieta*, 287 F. 2d 219 [2d Cir., 1960], it was held on the strength of the *Miner* doctrine that the importation into extradition proceedings of the subpoena *duces tecum* procedure was a "basic procedural innovation" beyond the power of a federal judge sitting as an extradition magistrate:

> "Implicit in Miner, however, is the warning that federal courts must proceed with extreme caution when asked to sanction basic procedural innovations which lie in that misty land where judicial and legislative powers meet." (287 F. 2d p. 225.)

In another application of the *Miner* doctrine, the United States Customs Court held that summary judgment procedures were "basic procedural innovations" which it had no power to utilize in a custom proceeding, *Weather-Rite Sportswear Co.* v. *U. S.*, 298 Fed. Supp. 508, 514 (1969).[14]

See also *Louisville Builders Supply Company* v. *Commissioner*, 294 F. 2d 333, 342 [6th Cir. 1961], holding deposition to perpetuate testimony not proper in tax court; *Gamble* v. *Pope & Talbot, Inc.*, 307 F. 2d 729, 732 [3rd Cir. 1962], holding District Court not authorized to fine counsel for late filing of pre-trial memorandum; *Federal Maritime Commission* v. *Anglo-Canadian Shipping Co.*, 335 F. 2d 255 [9th Cir. 1964], holding that grant of rule-making power

14. But see *Allen Forwarding Co.* v. *United States*, 340 Fed. Supp. 412 (1972), wherein the Customs Court utilized, and did not question the validity of, a local rule of the Customs Court, adopted in 1970, providing for summary judgment. This would clearly seem to be one of those "far reaching local rules," the validity of which, in the light of *Miner*, was called in question in 3A Barron and Holtzoff, Federal Practice and Procedure (1971 Pocket Part § 1711).

under Merchant Marine Act did not extend to Maritime Commission the right to adopt discovery rule on production of documents; *Socony Mobil Oil Company, Inc.* v. *The S. S. Pacific Tide,* 189 Fed. Supp. 724 (S. Dist. N. Y., 1960), holding summary judgment procedure not permissible in admiralty; and *Sea Trade Corporation* v. *Bethlehem Steel Company, Shipbuilding Division,* 192 Fed. Supp. 913 (S. Dist. N. Y., 1961), reaching same result.[15] All of these decisions were grounded on authority of *Miner* v. *Atlass, supra.*

B. Comments of the Draftsmen of the Federal Rules of Civil Procedure Show That the Purpose of Rule 83 Was to Enable District Courts to Make Limited Local Rules in Interstitial Areas.

Strong support for the theory that the grant of District Court rule-making power under Rule 83, F. R. Civ. Pro. was not intended for "basic procedural innovations," but merely for limited use in interstitial areas not covered by the Federal Rules, is found in the comments of those who participated in the drafting of the Federal Rules.[16]

Thus, Edgar Tolman, Secretary of the Advisory Committee is reported to have said that the function of Rule 83 was to enable District Court to fill "gaps" deliberately left in the Federal Rules where the subject matter was too

15. But see *Wirtz* v. *Hooper-Holmes Bureau, Inc.*, 327 F. 2d 939 [5th Cir. 1964], upholding validity of local District Court rule, requiring disclosure of witness list at pre-trial conference on ground that this was common practice and Supreme Court Rules Committee had expressly declined to amend Rule 16, F. R. Civ. Pro. to provide for it on the theory that it was better left to local option.

16. The Supreme Court has recognized the relevance of such statements to the interpretation of the Rules. *Mississippi Publishing Corp.* v. *Murphree,* 326 U. S. 438, 444-445 (1946):

> "But in ascertaining their [the Federal Rules'] meaning the construction given to them by the [Advisory] Committee is of weight."

variant for specification or of peculiarly local concern. He added, however, that such gaps were few because of the *comprehensiveness* of the Federal Rules[17], and that most gaps had resulted from a decision that the particular situation, not dealt with by the Rules, was *rare or relatively unimportant* or better handled on an *ad hoc* basis.[18] Said Mr. Tolman with reference to Rule 83:

> "[I]t *permits judges to decide the unusual or minor procedural problems* that arise in any system of jurisprudence in the light of the circumstances that surround them and of the justice of the case without the complications and injustice that must attend attempts to forecast the situations and to regulate them in advance either by general or by local rule.'"[19]

Tolman also expressed the fear that trial courts were passing too many local rules, thus frustrating the draftsmen's hope for a "simple, flexible, manageable mechanism with as few rules as possible."[20]

William Mitchell, Chairman of the Advisory Committee felt that the federal rules were meant to cover adequately most procedural questions and was critical of the plethora of local rules, designed to add detail to the Federal Rules, on the ground that they tend "to destroy uniformity in

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17. "One is also impressed with the comprehensive scope of the subject matter which regulates the whole procedure in civil actions in law and equity from the issuance of the summons and the filing of the first paper in the litigation throughout every stage of its progress in the trial court * * *", Hon. W. Calvin Chesnut, *Analysis of Proposed New Federal Rules of Civil Procedure*, 22 A. B. A. J. 533, 534 (Aug. 1936).

18. See summary of Tolman's remarks in Note on Rule 83, 67 Columb. L. Rev. 1251, 1255 (Nov. '67).

19. A. B. A., Federal Rules of Civil Procedure, Proceedings of the Institute at Washington and of the Symposium at New York City (1938) p. 129.

20. Note on Rule 83, 67 Colum. L. Rev. 1251, 1256.

practice throughout the United States.'"[21] He stated that if the District Courts continued to use Rule 83 to "add meticulous details that they think improve the Supreme Court rules, simplicity and flexibility will be removed, and uniformity will be destroyed * * *"[22]

The conclusions of the Committee on Local District Court Rules (Knox Committee), appointed by the Chief Justice in 1938 were in the same vein:

> "Apparently the Supreme Court and its Advisory Committee intended as far as possible *to cover generally in the Federal rules all aspects of the civil practice that need to be regulated in advance by rule of court, and to leave to the discretion of the trial judge the conduct of details of procedure* and the regulation of unusual situations as they arise in litigation and as the circumstances and the justice of the case may demand. Rule 83 of the Federal Rules of Civil Procedure strongly evidences this purpose by the very significant provision of its last sentence * * * The conclusion that most district courts can function with very few local rules is fortified by communications received from numerous judges who state that *the Federal Rules of Civil Procedure without supplement of any nature are quite sufficient for their needs.*"[23] (Emphasis supplied.)

The Columbia Law Review note on *Rule 83 and The Local Federal Rules* makes these cogent observations:

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21. Op. cit. note 19, p. 327. Mr. Mitchell's words proved prophetic. Thirty years later, in testimony before the House Judiciary Committee on April 21, 1967, Professor Rosenberg had this to say:

> "[D]istrict courts around the country are spawning [local rules] in great numbers. The Federal courts of this country are becoming a kind of *procedural Tower of Babel because of the differences in local rules*" See op. cit. note 20, p. 1259.

22. Op. cit. note 19, p. 232.

23. Knox Report p. 10, as quoted in op. cit. note 20, pp. 1257-1258.

"No general analytical guidelines for weighing the desirability or validity of a given local rule have been developed.[24] As a result, the majority of district courts have, in promulgating rules, ignored the principles of simplicity, scarcity and uniformity which guided the formulation of the Federal Rules. *At times, district courts have used their power under Rule 83 to negate specific requirements of the Federal Rules; more often, simply to escape from the arduous but essential task of case-by-case analysis.*"[25] 67 Columb. L. Rev. pp. 1251-1252 (Nov. 1967) (Emphasis supplied.)

III.

TO CUT IN HALF THE TRADITIONAL SIZE OF JURIES IS A "BASIC PROCEDURAL INNOVATION" OF NO SMALL CONSEQUENCE.

Based on the admittedly "few experiments" with six member juries which had preceded *Williams* v. *Florida*, 399 U. S. 78, 101-102, 90 S. Ct. 1893, 26 L. Ed. 2d 446, 460-461 (1970), this Court concluded in that case "that there is no discernable difference between the results reached by the two different-sized juries", and added:

> "Similarly, while in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible".

Since *Williams*, a voice that deserves to be heard has taken sharp issue with the above conclusion. The voice is that of Professor Hans Zeisel, a participant in the Univer-

24. Cited as exceptions, are the Knox Report and *Miner* v. *Atlass*, 363 U. S. 641 (1960).

25. See also the exhaustive note on *The Local Rules of Civil Procedure in the Federal District Courts—a Survey*, 1966 Duke L. J. pp. 1011-1112, which takes note of a comment of Professor Charles Alan Wright that the local rules represent the "soft underbelly" of federal procedure (p. 1012).

sity of Chicago Law School's extended study of the Ameri can jury system, co-author with Professor Harry Kalve of *The American Jury* (Little Brown & Co., 1966) (a com parative study of judge vs. jury conclusions in more than 3500 scientifically selected jury trials across the nation),[26] a statistician,[27] and surely one of this country's foremost authorities on jury behavior. After pinpointing and then forthrightly dismissing as "scant evidence by any standards"[28] the six citations of authority on which the "no discernible difference" conclusion in *Williams* was based, Professor Zeisel convincingly demonstrates that there is a difference of substantial proportions.

His chief point cuts to the core of the constitutional[29] and statutory goal that a jury be representative of a "fair cross-section of the community."[30] For purposes of illustration, he assumes that a 10% minority within a particular community share a particular viewpoint on some controversial issue, such as capital punishment or the desirability of schoolbussing. Assuming the selection by lottery of 100 twelve member juries and 100 six member juries, he poses the question: how often would the minority viewpoint probably be represented on the smaller jury as compared with the larger? Statistically, his answer is this:

> "Of the 100 twelve-member juries, approximately 72 would have at least one representative of that minority; while of the 100 six-member juries, only 47 would

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26. See *The American Jury*, Ch. 3, p. 33 et seq.

27. See profile in 58 A. B. A. J. p. 368 (Apr. 1972).

28. Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710, 715 (Summer '71), which is recapitulated in Zeisel, *The Waning of the American Jury*, 58 ABAJ 367 (April '72).

29. "To be sure, the number should probably be large enough to promote group deliberation • • • and to provide a fair possibility for obtaining a representative cross-section of the community," *Williams* v. *Florida*, 399 U. S. 78, 100.

30. 28 USC § 1861, 82 Stat. 54, as amended 3/27/68.

have one. It is clear, then, that however limited a twelve-member jury is in representing the full spectrum of the community, the six-member jury is even more limited, *and not by a 'negligible' margin,"* Zeisel, *And Then There Were None*, 38 U. Chi. L. Rev. 710, 716.

Inherent in the desire to obtain juries, representing a "fair cross-section of the community", is the notion that a jury so balanced is likely to, and hopefully will, reach a *centrist* result,[31] somewhere in between the extremes of opinion in the community. Zeisel confirms the reality of this assumption, stating, as applied to damages, for example, that "whatever the composition of the jury, the damages it awards will lie around the average of the evaluations of all individual jurors."[32] Again assuming 100 randomly selected twelve member juries and a like number of six member juries, he tabulates the statistically probable results to determine how often the 12 man jury is likely to deviate from the norm, as compared with the 6-man jury. His results indicate that about 68% of the 12-man verdicts will fall within the mid-range on damages, as compared with only about 51% of the 6-man verdicts. His results also show that only about 4% of the 12-man verdicts will reach extremes of damages on the high or low side, as compared with 16% of the verdicts of 6-man juries. He calculates that the "standard deviation" or spread of jury verdicts is about 42% greater in the case of the 6-man jury than in the case of the 12-man jury.[33] Can a 42%

31. "The great point is that a jury verdict is a group product; that the jury is not simply an atomistic electorate, but must work to a solution which is at least tolerable to all twelve. One result is that the filtering of individual eccentricity through the group process furnishes a major safeguard in the jury system", H. Kalven, Jr., *The Jury, the Law and the Personal Injury Damage Award*, 19 Ohio St. L. J. 158, 176 (1958).

32. 38 U. Chi. L. Rev. 710, 716. See also Kalven, op. cit. note 31, p. 177.

33. 38 U. Ch. L. Rev. pp. 717-718.

increase in the gamble that a lawyer and his client take in trying a case be passed off as "negligible"?

In the face of these very real and substantial differences between the six member jury and the traditional twelve member jury, the question arises, is the game worth the candle?

Chief Judge Edward J. Devitt of the United States District Court for the District of Minnesota, whose Court led the headlong rush of federal District Courts to adopt six member jury rules,[34] enthusiastically forecast nationwide cost savings of $1,600,000 from the change. Devitt, *The Six Man Jury in the Federal Court*, 53 FRD 273, 277 (1971). "Substantial savings" in time have also been forecast.[35]

Putting these factors into perspective, however, Hans Zeisel offers some sobering statistics:

> "But the money saved by having six-member civil juries in the federal courts amounts to about *2.5 per cent of the federal judicial budget* and to a little more than a thousandth part of 1 per cent of the total federal budget. As to the time likely to be saved, the best estimate is *three tenths of 1 per cent of the judge's working time*", Zeisel, *The Waning of the American Jury*, 58 A. B. A. J. 367, 370 (Apr. '72) (Emphasis supplied.)

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34. David J. Gibbons of the Chicago Bar, in a thoughtful and penetrating survey of the constitutional and legal problems, which cast doubt on the validity of these six member jury rules, pointed out that 43 of the 92 federal districts had abandoned twelve member civil juries during the interval of less than eighteen months between January 1, 1971, when the Minnesota District Court made its move, and the date of his article. Gibbons, *The New Minijuries: Panacea or Pandora's Box?*, 58 ABAJ 594 (June, 1972).

35. Bogue and Fritz, *The Six-Man Jury*, 17 S. Dak. L. Rev. 285, 288 [Spring '72]. There seems, however, to be a conspiracy of silence about the major saving of *deliberation time*, which will doubtless result from the six member jury. Could it be that no one wants to admit that with no more than six points of view to be reconciled, verdicts will receive only *one-half the consideration* that they used to receive?

IV.

THE THEORY THAT DISTRICT COURTS ARE FREE TO FIX BY LOCAL RULE THE SIZE OF CIVIL JURIES CONFLICTS WITH THE POLICY OF THE JURY SELECTION STATUTES.

Rule 83, F. R. Civ. Pro., has the virtue of brevity and the vice of incompleteness. For all that appears on the face of Rule 83, the rule-making power of District Courts is plenary, subject to the single limitation that local rules be "not inconsistent with these rules", i.e. the Federal Rules of Civil Procedure. But, of course, in addition to the "basic procedural innovations" limitation, there are other limitations that do not meet the eye. As pointed out in Barron and Holtzoff, local rules must be "reasonable"; they must be "uniform and non-discriminatory" and they must be "consistent with Acts of Congress" (citing 28 U. S. C. § 2071.) See 3A Barron and Holtzoff, *Federal Practice and Procedure* [Rules Ed. 1958] § 1711, p. 179.

It is submitted that the instant six-member jury rule, as well as those of the other federal District Courts, is completely at odds with the policy, expressed and implied in the jury selection statutes (28 U. S. C. §§ 1861 et seq., as amended March 27, 1968, Pub. L. 90-274 § 101, 82 Stat. 54.)

> 28 U. S. C. § 1861 declares in pertinent part:
> "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a *fair cross-section of the community* in the district or division wherein the court convenes. * * *"
> (Emphasis supplied.)

Section 1863 of the statute then expounds at length provisions for the establishment, operation and review by a reviewing panel of "a written plan for random selection of grand and petit jurors that shall be designed to achieve

the objectives of sections 1861 * * *" Paragraph (b)(3) of this section requires the plan to be designed to "*insure the random selection of a fair cross-section of the persons residing in the community* * * *". Paragraph (b)(4) requires the plan to "fix a *minimum number* of names to be placed initially in the master jury wheel, which shall be at least one-half of 1 per centum of the total number of persons on the lists used as a source of names for the district or division * * *". (Emphasis supplied.)

Here, then, are meticulous provisions for a carefully reviewed plan of jury selection, *designed to maximize the chances that the jury ultimately seated in the jury box will represent a "fair cross section" of the community.* Even the *minimum number* of names is specified, in order to insure a large enough sampling to be representative.

But, obviously, the representative character of a jury is only in part a function of the representative character of the array from which the jury is chosen. It also depends in substantial part upon the *size* of the jury ultimately seated. Having gone to such lengths to ensure that the array would in all likelihood be representative of a "fair cross-section" of the community, it is unthinkable that Congress could have intended to risk the frustration of that objective by leaving to the unchecked discretion of the judges of ninety-two separate federal districts the decision on the key question of jury size. As stated in *Winsby* v. *John Oster Manufacturing Company*, 336 Fed. Supp. 663, 666 (1972) (now pending on appeal to the Third Circuit, No. 72-1256):

> "Congress has recently demonstrated its intent to deal with the subject of jury selection by enacting comprehensive legislation, chiefly designed to ensure representation of a broader spectrum or cross-section of the community upon jury panels. *Nowhere in this system is there any suggestion that juries of less than twelve were contemplated*". (Emphasis supplied.)

The peremptory challenge statute (28 U. S. C. § 1870) also reflects the Congressional intent that the question of jury size should not be entrusted to the divergent viewpoints of individual District Courts. The three peremptory challenges, specified for each side, were plainly geared for twelve-member juries. Cut the jury in half and peremptory challenges can unseat the entire jury. What does this do to the prospects of seating a jury representative of a "fair cross-section" of the community?

Unquestionably, Congress intended that *not more than one-half* of a civil jury could be displaced by means of peremptory challenges. It is equally beyond question that Congress did *not* intend to permit District Courts to defeat that limitation by reducing the size of juries, least of all on a piecemeal and *non-uniform* basis.[36]

If, as stated in *Miner* v. *Atlass*, 363 U. S. 641, 650, 80 S. Ct. 1300, 1306, 4 L. Ed. 2d 1462, discovery is a "field of federal jurisdiction where *nationwide uniformity* has traditionally always been highly esteemed" (emphasis supplied), the same is even more true of the traditional twelve-member federal jury.

V.

THE INSTANT SIX MEMBER JURY RULE IS INCONSISTENT WITH RULE 48 OF THE FEDERAL RULES OF CIVIL PROCEDURE, PERMITTING REDUCTIONS IN THE SIZE OF JURIES BY STIPULATION ONLY.

Rule 48, F. R. Civ. Pro., provides:

> "The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury".

36. Cp. the instant Montana District Court six member jury rule with Rule 29½ of the Eastern District of Pennsylvania, which provides for trial to an *eight member* jury, in the absence of a demand for twelve members. Clearly, the peremptory challenge statute is not adaptable to juries of divergent shapes and sizes.

It is submitted that Rule 48 has a double impact: (1) It contains an affirmative grant to the parties of authority to stipulate to a jury of "any number less than twelve"; (2) Implicit in it is the belief, and, therefore, the intention, that such a stipulation shall be the *sole* means of reducing the size of the jury below twelve.

Rule 13(d)(1) of the United States District Court for the District of Montana, as amended effective September 1, 1971, provides:

> "1. A jury for the trial of civil cases shall consist of six persons plus such alternate jurors as may be impaneled."

Thus, it freezes the civil jury at six members. Unlike some of the other local jury rules, e.g. the Southern District of Illinois and the District of Kansas, which provide for six members "except as may be otherwise expressly required by law or controlling rule", the Montana Rule purports to restrict the jury to six members, even in the face of a Rule 48 stipulation of the parties to a jury larger or smaller than six members. To this extent, the Montana six-man jury rule is undoubtedly invalid, under the express proviso of Rule 83 F. R. Civ. Pro., that local rules be "not inconsistent with these rules".

Both the Ninth Circuit in *Colgrove* v. *Battin*, 456 F. 2d 1379 [9th Cir. 1972] and the Fifth Circuit in *Cooley* v. *Strickland Transportation Company*, 459 F. 2d 779 [5th Cir. 1972], rejected the contention that their respective six member jury rules were in conflict with Rule 48.[36A]

The Ninth Circuit's nearest approach, in its opinion, below, to confronting the issue of the parties' right to

36A. This issue is now pending on appeal to the Third Circuit in *Winsby* v. *John Oster Manufacturing Company* (No. 72-1256) and to the Seventh Circuit in *Levy* v. *Lawnmaster, Inc.* (No. 72-1171).

stipulate to the size of the jury is found in the following statement:

> "To read it [Rule 48, F. R. Civ. Pro.] to provide means for enlarging the jury, i.e. as an affirmative grant of a *right* to the parties to demand more than the law otherwise requires, is to stand it on its head". *Colgrove* v. *Battin*, 456 F. 2d 1379, 1381.

When the Ninth Circuit speaks of "enlarging the jury" and demanding "more than the law otherwise requires", the questions arise, "enlarging the jury" from *what* number and demanding more than *what* "law otherwise requires"? As David J. Gibbons cogently observed in his article, questioning the validity of the six member jury rules in general and the logic utilized in *Colgrove* in particular,

> "The only 'law' that requires fewer than twelve jurors is the very local rule which that court had under consideration. What the court actually did in *Colgrove* was to abrogate Rule 48 in deference to the local rule being challenged". Gibbons, *The New Minijuries: Panacea or Pandora's Box?* 58 A. B. A. J. 594, 597 (June '72)

Like Rule 13(d)(1) of the Montana District Court, Rule 13 of the Western District of Louisiana also purported to freeze the number of jurors at six members, irrespective of any contrary stipulation of the parties.[37] In upholding the validity of the Louisiana District rule, as against the contention that it deprived the parties of their right under rule 48 to stipulate to a jury of more or less than six, the Fifth Circuit in *Cooley* v. *Strickland Transportation, supra,*

37. It also provided for three peremptory challenges to each opposing party, plus a fourth peremptory challenge in the event of the empanelling of an alternate juror in a lengthy case. Query, whether this is in conflict with the peremptory challenge statute (28 U. S. C. § 1870)? See W. Dist. Louisiana local rule 13, eff. 4/15/71.

brushed past the argument with the following comment (459 F. 2d p. 784):

> "Rule 48, however, deals only with a stipulation by '*[t]he parties*'. It does not purport to prevent *court rules* which provide for civil juries of reduced size." (Emphasis, the court's.)

It is indeed true that Rule 48 deals with a stipulation by "the parties" and it necessarily prevents any local court rule which operates to deny to the parties their right to stipulate to a jury of some number other than six.

Both the Ninth Circuit in the instant case and the Fifth Circuit in *Cooley, supra,* refused to read into Rule 48 a negative intent to prohibit reductions in the size of juries in the absence of a stipulation of the parties. Both courts rested their conclusion in this respect on the fact that Rule 48 was promulgated at a time prior to *Williams* v. *Florida*, 399 U. S. 78, 90 S. Ct. 1893 (1970), when it was generally supposed that twelve member juries were a constitutional mandate. In the light of *Williams,* they felt that Rule 48 could no longer be construed as requiring twelve member juries.[38] See *Colgrove* v. *Battin*, 456 F. 2d 1379, 1381 (9th Cir. 1972) and *Cooley* v. *Strickland Transportation Company*, 459 F. 2d 779, 784-785 [5th Cir. 1972].

We respectfully submit that the conclusions of the Fifth and Ninth Circuits with respect to the effect of the *Williams* decision on Rule 48 are conceptually unsound. It is a fundamental principle of construction that a rule or other enactment is to be interpreted in accordance with the apparent intention of those who framed it *at the time of its enact-*

38. See *Fox* v. *United States*, 417 F. 2d 84 (5th Cir., 1969), construing Rule 48 to require a unanimous verdict by a jury of twelve. See also *Bourne* v. *A. T. & S. F. Ry. Co.*, No. 46,637, wherein the Supreme Court of Kansas recently held that under a Kansas statute *identical to Rule 48*, "litigants in the district court are entitled to have their cases tried by a jury of not less than 12 members unless there is a stipulation by the parties to the contrary."

ment. As the Ninth Circuit conceded in *Colgrove,* 456 F. 2d p. 1381:

> "Rule 48 must, we feel, be read in light of the fact that at the time of promulgation a jury of twelve was the only jury known to the federal law and was thought to be constitutionally required."

This being true, the draftsmen of Rule 48 obviously believed and intended to provide by that rule the *exclusive means* of reducing the size of the jury below twelve.

To suppose, as did the Fifth and Ninth Circuits in *Cooley* and *Colgrove,* that the draftsmen of Rule 48 would necessarily have had a *different* intention, had they known that the twelve member jury was not constitutionally required, presumes too much. It may well be the conclusion of this Court that a stipulation of the parties under Rule 48 should remain the *exclusive means* of providing for smaller juries. Least likely and least desirable of all, we submit, is the conclusion that decision on the size of juries should be left to the vagaries of more than ninety separate Federal District Courts.

VI.

CONCLUSION.

The United States District Courts are staffed by able, conscientious and well respected judges. It is respectfully submitted, nevertheless, that they have overstepped the limited grant of rule-making power, bestowed upon them under the Federal Rules, and never more so than in the case of the stampede to adopt six-member jury rules, which followed this Court's decision in *Williams* v. *Florida,* 399 U. S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970).

In taking this action, the District Courts presumed to anticipate a major change of constitutional interpretation, with respect to the Seventh Amendment, which the Supreme

Court expressly declined to make in *Williams* and has not made to this very day.[39] All of these local jury rules were adopted at a time when it remained the law of the land, as declared by this Court in a long line of cases, that trial by jury within the meaning of the Seventh Amendment means "a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them, * * *", *Capital Traction Company* v. *Hof*, 174 U. S. 1, 14, 19 S. Ct. 580, 43 L. Ed. 873 (1899).

By what license do District Courts take it upon themselves to make rules, which force parties to go to trial to a six member civil jury, the very constitutionality of which depends upon the accuracy of a forecast that this Court will reverse a long standing interpretation of the Seventh Amendment? Not only does such action put the litigants in a difficult situation, but it also puts this Court in the position of having to consider the effect upon cases heretofore tried under these local rules, should this Court decide that the Seventh Amendment requires twelve-member juries, after all.

The crux of the matter is that the District Courts have inflicted upon us more than forty hastily enacted jury rules of diverse application,[40] not even involving in all cases the same number of jurors. They have created what Professor Rosenberg aptly described as a "procedural

39. See *Williams* v. *Florida*, 399 U. S. 78, 92 note 30, 90 S. Ct. 1893, 1901 (1970). In *Winsby* v. *John Oster Manufacturing Company*, 336 Fed. Supp. 663, 664 (1972), Judge Dumbauld of the Western District of Pennsylvania stated that he had voted against his court's six member jury rule, because "prudence dictated awaiting a square holding by the Supreme Court of the United States sustaining the validity of such an innovation in the trial of civil and criminal cases in federal courts, rather than rushing in for reason of convenience and expediency * * *".

40. See tabulation appended to Gibbons, *The New Minijuries: Panacea or Pandora's Box*, 58 ABAJ 594, 597 (June '72) and text of various rules, Appendix A to *Cooley* v. *Strickland Transportation Company*, 459 F. 2d 779, 786-788 [5th Cir., 1972].

Tower of Babel because of the differences in local rules"[41] in a "field of federal jurisdiction where nationwide uniformity has traditionally always been highly esteemed". See *Miner* v. *Atlass*, 363 U. S. 641, 649 (1960).

More than two centuries ago Blackstone gave this prophetic warning to a country which subsequently abandoned civil juries:

> "(L)et it be again remembered that *delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty* in more substantial matters; that these inroads upon this sacred bulwark of the nation [the jury system] are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, *the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.*" (Blackstone's Commentaries, Vol. IV, p. 350; 11th Ed. 1791, as quoted in Kalven & Zeisel, *The American Jury* (Little Brown & Company, 1966, p. 7.) (Emphasis supplied.)

The adoption of rules reducing below twelve members the size of civil juries should be held beyond the power of United States District Courts and the judgments below should be reversed.

Respectfully submitted.

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[41] Note on Rule 83, 67 Colum. L. Rev. 1251, 1259, note 20.

CERTIFICATE OF SERVICE.

This is to certify that on November 21, 1972, three (3) printed copies of this Brief Amicus Curiae were served upon each of the parties to the above-entitled action by depositing the same in the United States mail, with air mail postage prepaid, addressed to the parties' respective counsel of record, as follows:

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